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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

SHEILA RYAN DE LUCA,

Petitioner,

— against —

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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QUESTIONS PRESENTED

I. Whether the petitioner's Fourteenth Amendment due process rights were violated where her conviction for murder rests on evidence which was entirely circumstantial and which was as consistent with the proposition that it was the petitioner's husband who killed the decedent as it was with the proposition that it was the petitioner.

II. Whether in a close, circumstantial case, petitioner was entitled to a new trial under Brady v. Maryland and United States v. Bagley where, despite a specific request, the prosecutor suppressed the existence of, identity of, address of and information given by a witness who had told the police and prosecutor that the petitioner had not uttered a threat to kill the decedent where one of the prosecution's key witnesses testified that

petitioner had uttered a threat and where the prosecutor argued that the threat was evidence that petitioner had both the mindset and the means to commit murder.

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The judgment sought to be reviewed is a judgment of the Appellate Division of the Supreme Court of New York, First Department dated April 11, 1985, which affirmed, without opinion, a judgment of conviction entered against the Petitioner by the Supreme Court, Bronx County on May 18, 1984. (A-1) By order dated August 15, 1985, the Court of Appeals of the State of New York denied leave to appeal the decision of the Appellate Division, First Department. (A-3)

By order dated September 30, 1985, Associate Justice Thurgood Marshall granted Petitioner's motion for an

extension of time to file this Petition for a Writ of Certiorari to and including November 13, 1985. (A-5)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law...

New York Penal Law §125.25[1] provides, in relevant part:

> A person is guilty of murder in the second degree when:
>
> (1) with intent to cause the death of another person, he causes the death of such person or of a third person...

STATEMENT OF THE CASE

Introduction

Sheila Ryan DeLuca, a 15-year veteran of the New York City police department, is presently serving a sentence of 20 years to life for a murder that she has steadfastly maintained she did not commit. She claims that the prosecution failed to prove her guilt beyond a reasonable doubt (in part because the state destroyed potentially exculpatory evidence: proof of the decedent's time of death) and that the prosecution suppressed plainly exculpatory evidence.

Notwithstanding the substantiality of Mrs. DeLuca's claims of constitutional error, or perhaps because of the substantiality and

incontrovertibility of those claims, no New York court has attempted to explain why Mrs. DeLuca's conviction stands. The trial court merely asserted that the proof was sufficient to support the conviction. The trial court ignored the Brady claim entirely.

The Appellate Division, in affirming the conviction, was even less forthright. At oral argument, it seemed clear from the nature of the questions from the bench and from the length of time the Court allowed oral argument to continue that members of the five-member panel found the issues raised troubling, difficult and substantial. Nevertheless, astonishingly, that court simply

affirmed without opinion. The Court of Appeals denied leave to appeal, also without an opinion.

Mrs. DeLuca has been denied any meaningful appellate review, at least so far as the record in this case discloses. Her conviction and sentence stand although no court has attempted to or taken the trouble to explain how that can be in light of this Court's decisions and the fundamental Constitutional gurarantee of due process. If there is an explanation, Mrs. DeLuca has a right to hear it. It there is no explanation, Mrs. DeLuca has a right to be free.

The course of action taken by the New York courts should not -- cannot -- be permitted to operate to deprive her of review of her federal claims in this

Court, yet that may be a by-product of the state courts' actions. Petitioner appreciates that discretionary review on certiorari of a criminal judgment unsupported by any written opinion is unlikely. Accordingly, petitioner respectfully suggests that, if this Court deems it appropriate, the case be remanded to the Appellate Division with directions that that court explain its affirmance of the judgment of conviction. Such a course would serve the interests not only of the petitioner, but of the system of criminal law in our nation. Justice and fair play require no less.

Proceedings Below

Petitioner Sheila Ryan DeLuca, was indicted and charged, under New York Penal Law §125.25[1], with second

degree murder in the shooting death of Robert Bissett. Bissett's fully-clothed body was found on the evening of September 22, 1982 in his van at a location off the Major Deegan Expressway in the Bronx. The People's theory, explicitly set forth in its bill of particulars, was that Bissett was shot by the defendant on September 22, 1982 between 1:00 PM and 2:00 PM.

There was evidence at trial of the following events. In the early morning hours of September 22, 1982, after celebrating a softball victory at Pauline's Bar, Sheila DeLuca and her friend Karen Travalena went on to an afterhours club in the Bronx. The decedent, Robert Bissett, and two male friends of his were at the club, continuing a long night of drinking.

Several hours later, at approximately the same time, the five individuals left the club, but Sheila DeLuca returned to use the ladies room. The club's blackjack dealer, Michael Belloise, testified at trial that as Sheila DeLuca passed by him and the two persons who were playing blackjack on her way out of the club for the second time, Mrs. DeLuca said to the blackjack players, "I'm an ex-cop and these guys better not fuck with me because I'll kill them."[1]

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[1]Testifying before the grand jury only three weeks after the incident, Belloise reported the statement somewhat differently: he did not testify that Mrs. DeLuca had said anything about killing anyone. Rather, he told the grand jury, "After she used the bathroom she came out and she said to no one in particular -- I don't know if anyone knew her -- in general she just said she was an ex-cop and the guys outside better not fuck with her because she wouldn't take any shit from

(footnote continued)

After Travelina was dropped off, Bissett, DeLuca and Bissett's two friends spent some time driving around the Bronx drinking. At one point, they stopped at a Bronx motel, and Bissett's two friends, who had caused a disturbance at the motel, left on foot.

Apparently, in the early afternoon, Bissett and DeLuca drove back to where Bissett's van had been left near the afterhours club.

The van was thereafter spotted by Sanitation and Water Department employees at a spot in a large puddle off the Major Deegan Expressway in the

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(footnote continued from previous page) them and she might get back at them or something."

Indeed, when interviewed by the police within a day or two of the incident, Belloise made no mention whatsoever of any threat having been made by DeLuca.

Bronx. Several workmen noticed the van moving up and down rhythmically and joked about someone having sex inside. Several of the workmen also saw a woman of Mrs. DeLuca's general description walking away from the direction of the van in an unsteady manner at about 2:00 PM. None of them could identify the woman as Mrs. DeLuca. Although it was not very noisy at the location, none of the workmen had heard any gunshots.

Ann O'Byrne, whose aunt owned Pauline's Bar and who had attended the softball victory party, cleaned house for Sheila DeLuca and her husband one day a week. O'Byrne went to the DeLuca residence on the morning of September 22nd to clean. Shortly after she arrived, the telephone rang and, Sheila DeLuca's husband, Peter DeLuca, who was

a retired police officer, answered it. He told O'Byrne he was going out. He left around 11:30 AM and returned about 45 minutes later. He stayed for a few minutes, then went out again, coming back ten minutes later with some packages from the store. The telephone rang again and O'Byrne heard Peter DeLuca say, "What's wrong with you now." He went out again at about 1:00 PM, telling O'Byrne he was going to look for his wife. At about 1:30 he telephoned home, and asked O'Byrne whether she had seen or heard from Mrs. DeLuca. He left word with O'Byrne that he was on his way back. Five minutes later, he was home. He told O'Byrne that he had looked for Sheila

everywhere. At about 1:45 he left again, saying he was going to look for his wife.

At about 2:20 PM Sheila DeLuca arrived home in her car; Peter DeLuca pulled his car in almost immediately afterwards. They spoke for a few minutes in the garden. Then Sheila DeLuca, who was wearing the same clothes she had worn the night before, went into her bedroom and changed. O'Byrne, who was cleaning in the basement, heard Mr. and Mrs. DeLuca speaking in loud voices upstairs. Peter DeLuca drove O'Byrne home at about 4:30 PM. O'Byrne had not noticed any water or mud on Peter DeLuca's pants legs. Neither O'Byrne nor anyone

else testified about Peter DeLuca's actions or whereabouts after taking O'Byrne home.

Shortly before 7:00 PM, a telephone call was received by a detective at the 46th Precinct from a man who identified himself as Peter DeLuca. The caller said there was a dead man in a van and gave the location, which he said was in the 46th Precinct. He left his name, address and telephone number and said he would tell the police about it after the body was found. Fifteen minutes later, a similar telephone call was received by the police. In a subsequent call to the 52nd Precinct, Peter DeLuca said that the man in the van had raped his wife.

At approximately 7:30 PM, the police found Bissett's fully clothed body in his van, which was in a large puddle of water at a location within the 52nd Precinct. He was slumped between the front seats with a bruise on the top of his head and four bullet wounds in his head. The bruise was consistent with his having been struck with a bottle. The medical examiner testified that the bullet wounds caused Bissett's death, but she could not fix the time of his death because no tests had been done at the scene and the body had been refrigerated. The refrigeration had altered the progression of signs that appear after death, making valueless the usual tests performed to determine

time of death. Bissett had cocaine in his system. Tests also showed that he had had sexual intercourse.

Sergeant Rudolph Eberhardt, who was assigned to the Bronx Sex Squad, was notified of Peter DeLuca's telephone call. He telephoned the DeLuca residence, and Peter DeLuca put his wife on the telephone. Mrs. DeLuca told Eberhardt that she had been at a club where she had been playing blackjack and that, on leaving, three males forced her into a van and took her to a motel where they watched TV sex movies and said they were going to have sex with her. She indicated that three were too many and an argument erupted among them as to whom it would be. She reported that one of the men forced her into the van and took her to

the vicinity of Fordham Road and the Major Deegan and that he raped her in the rear of the van.[2] She struck him in the head with a bottle which was in the back of the van and he rolled over. She left the van, leaving him lying in the back. She called her husband at home and told him where she was. Apparently there was a mix-up in the directions. When he failed to arrive she walked back to her car and drove herself home.

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[2]The prosecution suggested repeatedly that Sheila DeLuca's statement to the police that she had been raped was false because her post-rape behavior was inconsistent with her having been raped. In response, the defense sought to introduce expert testimony about post-rape trauma. The prosecution objected on the grounds that there was no proof of rape and no claim of a defense of justification. The court refused to permit the expert to testify.

The police went to the DeLuca residence where Peter DeLuca and Sheila DeLuca declined to answer questions. Mrs. DeLuca filed a formal rape complaint and was taken to the hospital for examination and treatment.

The police accompanied her from the hospital back to her house. There, at the DeLuca residence, Peter DeLuca handed a gun over to the police saying, "this is the gun you're here for." The gun was a .38-caliber Smith & Wesson revolver formerly owned by Peter DeLuca but transferred to Sheila DeLuca prior to her husband's retirement from the police force. Ballistics tests showed that this was the gun from which the bullets which had struck Bissett had been fired. Two other guns were handed over to the police by Mrs. DeLuca.

The defense rested without calling any witnesses, relying on the presumption of innocence and the prosecution's failure to prove its case. The defense took the position that the evidence, all of it circumstantial, was deficient in several important respects and, moreover, was entirely consistent with the proposition that it was Peter DeLuca, who had called the police, informed them of the van's precise location, offered to tell the police about the body, and handed over the weapon, who had shot and killed Bissett.

In his summation, the prosecutor conceded that the evidence against Sheila DeLuca was circumstantial, but argued that it nevertheless established

her guilt. The prosecution focused on two "facts": that Bissett was killed with a gun registered to Sheila DeLuca and that Mrs. DeLuca's own statement on leaving the afterhours club showed that she had a gun with her and that she intended to use it if the occasion arose. He also argued that she had lied about having been abducted and raped, urging that her behavior was not the behavior of a rape victim and suggesting that her false claim of rape was concocted to conceal her guilt and was itself circumstantial evidence of guilt. He denigrated the suggestion that Peter DeLuca could have killed Bissett arguing that the fact that O'Byrne had not seen mud on his pants leg indicated that Peter DeLuca had not been at the scene of the shooting.

The court charged the jury with respect to both second degree murder and manslaughter in the second degree. The jury found the defendant guilty of murder in the second degree.

By post-trial motion the defendant sought to have the verdict set aside because the evidence was insufficient to establish guilt beyond a reasonable doubt.[3] Sheila DeLuca argued in that motion that the evidence was insufficient to prove her guilt since it was all equally consistent with her

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[3]Defendant's post-trial motion, dated May 15, 1984, and the affirmation in support of that motion raise, as Point I, the failure of the People's proof to establish beyond a reasonable doubt that the defendant was the person who caused the death of Robert Bissett. (A.379, 381-87 of the Appellant's Appendix in the Appellate Division). This issue was argued as Point I of the Petitioner's brief on appeal to the Appellate Division and, again, in her application for leave to appeal to the Court of Appeals.

husband having shot and killed Bissett. Only if there had been evidence that Bissett was killed, as the prosecution charged, before 2:00 PM rather than after 2:00 PM, or had there been evidence that Mrs. DeLuca had her gun with her during the period when she and Bissett were together would the evidence have pointed to her, rather than her husband as the agent of Bissett's death. Neither of these propositions had been proved.

There was no evidence as to the time of Bissett's death because the medical examiner had performed no tests to determine it, and indeed, had treated Bissett's body in a way which made it impossible to determine when he had died.[4]

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[4]Petitioner argued in the Appellate (footnote continued)

As to proof that Sheila DeLuca was in possession of the gun, the only evidence of this was an inference the prosecution asked the jury to draw from Michael Belloise's testimony that Mrs. DeLuca had uttered a threat to kill upon leaving the club. According to the prosecutor, that threat was evidence that Mrs. DeLuca had both the mindset, and the means, to commit murder.

What the prosecution had failed to mention -- and what formed an independent ground for the new defendant's trial motion -- was the prosecutor's failure, despite specific

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(footnote continued from previous page) Division that the State's treatment of the body and destruction of this potentially exculpatory evidence violated her due process rights under California v. Trombetta, 104 S.Ct. 2528 (1984).

Brady requests, to disclose the name, address, and information which had been given to the police and prosecutor by the blackjack player to whom Mrs. DeLuca had allegedly addressed her remark, one Arthur Fuhst. Fuhst, whom the defense was able to locate only after Belloise's testimony had been given and only after the trial had ended, made an affidavit in which he swore that Mrs. DeLuca had said no such thing and that he had told this to the police and to the prosecutor when interviewed by them prior to trial. His affidavit further disclosed that after he told this to the prosecutor (an assistant district attorney other than the prosecutor who tried the case), the assistant district attorney

drew an "X" across his page of notes, and told Fuhst he would not be needed and could go home.

The State's suppression of Fuhst's exculpatory information is another issue as to which Petitioner seeks review in this Court. The issue was raised in the trial court by post-trial motion for a new trial based both on newly discovered evidence and on the prosecution's deliberate suppression of that evidence in violation of Brady v. Maryland.[5] The issue was presented to

[5]Defendant's post-trial motion, dated May 15, 1984, and the affirmation in support thereof raise in Point II, the newly discovered Fuhst evidence and the prosecution's deliberate suppression of it as grounds for a new trial. (A.380, 388-94 of Appellant's Appendix in the Appellate Division)

the Appellate Division and Petitioner sought, without success, to raise it in the Court of Appeals as well.[6]

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[6]The prosecutor's suppression of exculpatory evidence was Point III of Defendant's Brief in the Appellate Division.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE IMPORTANT AND RECURRING QUESTION WHETHER A CONVICTION CAN STAND, CONSISTENT WITH THE DUE PROCESS CLAUSE, WHERE THE EVIDENCE IS AS CONSISTENT WITH THE PROPOSITION THAT IT WAS AN IDENTIFIABLE PERSON OTHER THAN THE DEFENDANT WHO COMMITTED THE CRIME AS WITH THE PROPOSITION THAT IT WAS THE DEFENDANT.

Logically, only two persons could have killed Robert Bissett, whose body was found at 7:00 PM and whose time of death could not be established because the state's treatment of the body had destroyed this critical -- and potentially exculpatory -- piece of information. It was either Sheila DeLuca, the defendant, who was with the decedent until 2:00 PM on the day he was killed, or Sheila DeLuca's husband, whose whereabouts after 4:30 PM on that day were entirely unknown but who knew,

most likely because he had been there, where the body could be found, and who called the police to report it, offered to tell the police about it, ultimately turned over to the police the gun which had been used to kill Bissett and who had, clearly, a motive as strong as his wife's for killing Bissett.

This case thus presents the important question whether, consistent with the due process clause, where the prosecutor has decided to prosecute one of the two persons who could have killed the decedent and succeeds in obtaining a conviction, that conviction can stand.

In In re Winship, 397 U.S. 358 (1970), this Court made explicit what had long been assumed: that the Due

Process Clause of the Fourteenth Amendment protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. The reasons for the requirement have been fully explained by this Court.

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence -- that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'...
>
> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose

his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction ... 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value -- as a criminal defendant his liberty -- this margin of error is reduced as to him by the process of placing on the other party the burden of ... persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt...'...

Moreover, use of the reasonable- doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

Id. at 363-64. See also Taylor v. Kentucky, 436 U.S. 478 (1978); Jackson v. Virginia, 443 U.S. 307 (1979); Johnson v. Louisiana, 406 U.S. 356 (1972).

This Court has recognized that circumstantial evidence is not intrinsically different from or less probative than direct testimonial evidence. Holland v. United States, 348 U.S. 121, 139-40 (1954). Moreover, at least in recent times, the federal Courts of Appeals have been in agreement that the Constitution does not require in cases built on circumstantial evidence that that evidence exclude every reasonable hypothesis of innocence. Even entirely circumstantial evidence is sufficient to support a conviction under the

Constitution "provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." See United States v. Bell, 678 F.2d 547, 549 & n.3 (5th Cir. 1982).

But it is nevertheless true that there is a difference between cases based on circumstantial evidence and those based on direct evidence.

If the guarantee of no conviction absent proof beyond a reasonable doubt is to be more than an empty phrase, cases involving circumstantial evidence must be closely reviewed because they require the jury to understand and undertake a more complex and problematic reasoning process than do cases based on direct evidence. In the latter situation, the jury is normally

concerned primarily with assessing the credibility of witnesses, a role for which the jury is well suited and for which appellate tribunals, whose judges have not heard or seen live witnesses, are particularly ill-equipped. But in circumstantial cases, the task which the jury is called on to perform tends to be more complex -- and is thus more subject to error. Where the defendant's guilt is to be proven, if at all, by circumstantial evidence, the jury must attempt a careful and clear analysis of the evidence and determine what inferences can and should be drawn. Clear judicial supervision is necessary to insure that the jury does not make inferences which are based not on the evidence presented, but rather on unsupported assumptions. As the

language of the New York cases recognizes, careful review of circumstantial evidence cases is necessary to minimize "a danger legitimately associated with circumstantial evidence -- that the trier of facts may leap logical gaps in the proof offered and draw unwarranted conclusions based on probabilities of low degree." People v. Benzinger, 36 N.Y.2d 29, 32, 364 N.Y.S.2d 855, 856, 324 N.E.2d 334, 335 (1974).

In the instant case, the trial court paid no more than lip service to these basic principles. In denying the defendant's motion to set aside the verdict, that court merely stated

> The Court takes the position with respect to ... the motion to set aside the verdict as being insufficient under the law; that the Court is satisfied that the evidence that was presented

> before the jury warranted and justified the verdict of the jury.

(A.8-9) The Appellate Division simply affirmed without opinion. Thus no theory -- persuasive or otherwise -- has been articulated which even attempts to rebut Petitioner's highly compelling claim that the state's proof contained two gaping holes. The People did not prove that Mrs. DeLuca had her gun when she was with Bissett and the People did not prove that Bissett was shot before 2:00 PM as the State had contended. That she had the gun is an inference drawn from the assumption that Bissett was shot before 2:00 PM. That he was shot before 2:00 PM is deduced from the assumption that Mrs. DeLuca shot him before leaving the van at around 2:00 PM, and that is itself

derived from the "fact" that she had with her her gun. The circularity of the reasoning is plain and should have been recognized to be fatal to the prosecution's case.

The People did not prove that Mrs. DeLuca had a gun with her at the afterhours club or in the van where Bissett was shot. To be sure, the gun was registered to her, but it was handed over to the authorities not by Mrs. DeLuca but by her husband, whose gun it had orginally been.

The People argued that Mrs. DeLuca's alleged threat upon leaving the afterhours club carried the implicit assertion that she had the means to carry out the threat, but surely that conclusion is based on impermissible conjecture and

speculation which does not follow from the words Mrs. DeLuca allegedly spoke, even assuming that she spoke them. Whether she made the incriminating statement is itself subject to substantial and troubling questions. See Point II, infra.

The other significant gap in the People's case involved the time of Bissett's death. The People were able to produce no evidence that Bissett was shot prior to Mrs. DeLuca's leaving the van at approximately 2:00 PM. Indeed, the treatment of Bissett's body by the authorities destroyed any possibility of either side adducing such evidence and itself raises very serious questions about the validity and fundamental fairness of the conviction. No gunshots were heard by the men

working in the vicinity of the van. Under the circumstances, and given the otherwise circumstantial nature of the evidence, the inability of the prosecution to establish time of death was an incurable defect in the proofs.

Consequently, there is in the case more than reasonable doubt as to whether an innocent person has been convicted and sentenced and serious question whether that conviction was obtained on proof which failed to satisfy the Constitutional minimum: proof beyond a reasonable doubt of every fact necessary to constitute the crime charged.

This Court, in reviewing a conviction under New York's murder statute, has recognized that "the death, the intent to kill, and

causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder." Patterson v. New York, 432 U.S. 197, 205 (1977). In this case, the circumstantial evidence adduced and the gaps in that evidence leave much too high a possibility that the defendant stands convicted of a crime committed not by her, but by another. The Court should grant certiorari to determine then whether this is a conviction which the Constitution can or will tolerate, and to give guidance to the state courts as to the meaning of the perhaps too familiar and thus too infrequently pondered standard of proof beyond a reasonable doubt.

II. THIS CASE MERITS REVIEW BY THIS COURT BECAUSE THE COURTS OF THE STATE OF NEW YORK HAVE COMPLETELY IGNORED BINDING DECISIONS OF THIS COURT ON AN IMPORTANT QUESTION UNDER BRADY v. MARYLAND -- THE NECESSITY FOR A NEW TRIAL WHERE THERE HAS BEEN DELIBERATE PROSECUTORIAL SUPPRESSION OF A WITNESS' STATEMENT THAT THE DEFENDANT DID NOT MAKE A THREAT WHICH A PROSECUTION WITNESS TESTIFIED SHE HAD MADE -- IN A CASE WHERE, EVEN WITHOUT THIS EXCULPATORY EVIDENCE, CONFIDENCE IN THE OUTCOME IS FAR FROM OVERWHELMING

This case also presents for review an important question under Brady v. Maryland, 373 U.S. 83 (1963), and under this Court's recent decision in United States v. Bagley, 105 S.Ct. 3375 (1985): whether a conviction can stand, consistent with the Due Process Clause, where the prosecutor has suppressed the existence and identity of a witness, one Arthur Fuhst, and the fact that

that witness had informed both an assistant district attorney and investigating police that Mrs. DeLuca had uttered no threat upon leaving the afterhours club. Had this evidence been available to the defense at the time of trial, it would surely have been used to impeach Michael Belloise, the blackjack dealer who testified that Mrs. DeLuca had said -- to the blackjack player Fuhst -- that she would kill these guys if they fucked with her. But it had far more than impeachment value; the testimony Fuhst would have given was directly exculpatory since it would have eliminated the lynchpin of the State's case. The prosecution argued that Mrs. DeLuca's threating words constituted circumstantial proof that she had both

the mental state and the means, a gun, to kill if the occasion were to arise. Without that threat, then, there was virtually no case against Mrs. DeLuca at all.

This case would thus seem to present a clear case for application of the mandate of Brady and Bagley. There is here "a reasonable probability that, had the [suppressed] evidence been disclosed to the defense, the result of the proceeding would have been different." The probability is sufficient to "undermine confidence in the outcome." United States v. Bagley, supra, 105 S.Ct. at 3384.

The trial court never directly addressed the defendant's contention that the prosecutor's suppression of evidence violated Brady v. Maryland.

The defendant had argued both that Fuhst's new information was newly discovered evidence which entitled her to a new trial without regard to whether the prosecution had improperly suppressed the evidence. Alternatively she argued that she was entitled to a new trial because there had been a Brady violation.

The trial court, denying the motion, addressed itself only to the newly discovered evidence contention and ignored her Brady claim. As to the claim based on newly discovered evidence, the trial court concluded that Mrs. DeLuca was not entitled to a new trial because the newly discovered evidence was not "material." In the court's view, had Fuhst testified, it would not have materially altered the

jury's verdict. The court indicated that cross-examination had succeeded in bringing to light variations between Belloise's grand jury testimony and his trial testimony.

> '[T]he best that Mr. Fuhst could say is precisely what the district attorney said, and that is that he didn't hear that statement, he could in no way testify that Mr. Belloise didn't hear it or was making it up. The best he could say if he were called to the stand ... to testify is that he didn't hear it. (A. 11)

The Appellate Division, of course, simply affirmed the conviction without opinion, and may well have ignored the Brady question as the trial court had done.

Whatever the propriety of the trial court's analysis for a simple state law claim based on newly discovered evidence, it cannot suffice to dispose of the Brady claim.

First, this Court has unequivocally rejected a distinction between impeachment evidence and exculpatory evidence for Brady purposes. United States v. Bagley, supra, 105 S.Ct. at 3381. Yet it is plain that the state court characterized -- actually mischaracterized -- Fuhst's evidence as "merely impeaching" and, because of that mischaracterization, failed to appreciate its significance and its probable impact on the jury's verdict.[7]

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[7]The impeachment potential of the suppressed evidence was enough to satisfy the standards enunciated in Bagley and Brady. To be sure, the defense had attempted to impeach

(footnote continued)

Had Fuhst testified that Mrs. DeLuca said nothing on leaving the afterhours club, that surely would have tended to impeach Belloise, who had testified that she had indeed made a statement.[8] But beyond impeaching Belloise, Fuhst's testimony would have been directly exculpatory in that it would have

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(footnote continued from previous page) Belloise using his prior, somewhat inconsistent statements, but the attempt must have failed. It cannot be said that additional impeachment ammunition in the form of direct contradiction by another witness would have made no difference.

[8]The trial court suggested that the rules of evidence would have prohibited Fuhst from testifying that Mrs. DeLuca had uttered no threat and would have allowed him to testify only that he had not heard her utter any threat. This, of course, is not the law; "negative knowledge" is no less probative them positive. See generally, 2 Wigmore, Evidence §664 (Chadbourne rev. 1970). In any event, a state rule of evidence which excluded probative exculpatory evidence of this type would no doubt itself run afoul of the Fourteenth Amendment.

eliminated a critical building block in the prosecution's case. Given the weakness of the evidence and the gaping holes in the circumstantial case, this would plainly appear to be a case in which confidence in the outcome of the trial has been undermined; indeed it has been shattered.[9] Because serious

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[9]This case is thus much like the situation described by Judge Jon Newman and referred to in Justice Marshall's dissenting opinion in Bagley: whether a prosecutor would be obliged under Brady to disclose the name of a bank customer witness who, viewing a bank robbery suspect, had said that is not the man where four or five other witnesses had picked the suspect out of a line up. Judge Newman, who had put what he viewed as the clearest case for Brady disclosure to a large group of state prosecutors, was surprised that only two of the prosecutors indicated they would disclose this information.

The suppressed information here was, on the facts of the case, as or more exculpatory than the hypothetical bank customer's exculpatory statement. It was, in other words, a clear case for disclosure.

treatment of this serious claim by the state courts has been utterly lacking, and because the lack of serious treatment can only serve to encourage prosecutors in New York State to withhold from defendants impeaching and otherwise exculpatory material, the Court should exercise its discretion and grant the writ of certiorari.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this Court grant a writ of certiorari.

Respectfully submitted,

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Victoria B. Eiger
Of Counsel

November 11, 1985

APPENDIX

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 11, 1985.

Present - Hon. John Carro,
Justice Presiding
Max Bloom,
Arnold L. Fein,
Bentley Kassal,
Betty Weinberg Ellerin,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- SHEILA RYAN DeLUCA, Defendant-Appellant	ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT 22959

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court. Bronx County (Lawrence Tonetti, J.), rendered on or about May 18, 1984, convicting her of murder in the second degree, and said appeal having been argued by Alan M. Dershowitz, of

counsel for the appellant, and by Steven R. Kartagener, of counsel for the respondent; and due deliberation having been had thereon,

it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTERED: HAROLD J. REYNOLDS
Clerk

Counsel for appellant
is referred to §606.5
Rules of the Appellate
Division, First Department

No. 1763

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. BERNARD S. MEYER,
Associate Judge

THE PEOPLE OF THE
STATE OF NEW YORK,
Respondent,

against

SHEILA RYAN DELUCA,
Appellant.

CERTIFICATE
DENYING
LEAVE

I, BERNARD S. MEYER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,[1] there

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[1]Description of Order:
Order of the Appellate Division, First Department, entered April 11, 1985, affirming a judgment of the Supreme Court, Bronx County, rendered May 18, 1984, convicting defendant of murder in the second degree.

is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
August 15, 1985

Bernard S. Meyer
Associate Judge

SUPREME COURT OF THE UNITED STATES

NO.

SHEILA RYAN DeLUCA,
Applicant,

-v-

NEW YORK

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner, IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 13, 1985.

/s/Thurgood Marshall
Associate Justice of
the Supreme
Court of the
United States

Dated this 30th
day of September, 1985.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 55

THE PEOPLE OF THE STATE OF NEW YORK

-against-

SHEILA RYAN DeLUCA,
Defendant

MOTION AND SENTENCE

Indictment No. 3631/82

851 Grand Concourse
Bronx, New York

May 18, 1984

BEFORE:
HON. LAWRENCE TONETTI,

J U S T I C E.

APPEARANCES:

MARIO MEROLA, ESQ.
District Attorney
Bronx County
BY: ANTHONY SCHEPIS, ESQ.
Assistant District Attorney

PATTEN AND GANUN, ESQS.
Attorneys for the Defendant
111 Broadway
New York, New York
BY: JOHN D. PATTEN, ESQ.

ALSO APPEARING:
PATRICK GILL, ESQ.

Beth Abramowitz
Senior Court
Reporter

PROCEEDINGS

...

THE COURT: This isn't a debate. I heard too much already. I have been very patient. I have the moving papers.

It is the motion before this Court to set aside the verdict rendered by a jury on the grounds that that verdict was unsupported by the weight of the evidence under the law. In addition to that, counsel has moved for a new trial on the basis of newly discovered evidence, submitting an affidavit from the person named Arthur Fuhst. Also, counsel has suggested that the Court erred in not admitting the expert testimony on post rape trauma and on that ground the Court should set aside its verdict, the verdict of the jury. And, finally the Court erred, according

to counsel, in its charge on circumstantial evidence and on that basis the Court should set aside the conviction and order a new trial. The prosecution has submitted an answering affidavit and an affirmation. In addition that the prosecution has submitted, the Court has received a statement of counsel in subsequent proceedings before this Court. Also there is a memobook entry of conversations with one Arthur Fuhst and in addition there is a DD5 which the People have handed up to the Court concerning an interview with one Arthur Fuhst with respect to the motion before the Court.

The Court takes the position with respect to point one, the motion to set aside the verdict as being insufficient under the law; that the Court is

satisfied that the evidence that was presented before the jury warranted and justified the verdict of the jury. And, on those grounds alone the motion must be denied.

With respect to point two, the newly discovered evidence concept, based on the evidence of one Mr. Fuhst, the Court denies the motion for a new trial on that ground for two reasons: One, I have serious reservations as to whether or not Mr. Fuhst could have been discovered prior to this trial. I had occasion to see and observe the diligence of counsel's efforts on behalf of this client throughout this trial of the 32 witnesses that testified here. I think that counsel had interviewed or spoke to at least 25 of those 32 witnesses prior to their taking the stand, which is evidence of

the diligence and preparation that went into the representation of the defendant in this case.

I find it difficult to accept counsel's contention that Mr. Fuhst could not have been located prior to the trial. This case having pended before this Court for almost a year and a half before it was reached for trial. But, secondly, and more importantly, I find that it is my judgment that the testimony of Arthur Fuhst would fail to meet the second prong required by law, and that is that counsel has been able to establish that the testimony of Mr. Fuhst would have substantially altered the verdict of this jury. I find it difficult to accept based on my analysis of all the evidence that was submitted to the jury, while it is true that Mr. Belloise's testimony was an

important fact, I think, before this jury, that testimony was impeached extensively by counsel on cross examination. All the factors that counsel touched upon in his argument wherein Belloise had expanded on his original testimony before the grand jury were brought out on cross examination were exposed to the jury, were summed up on. All of these arguments were put forth and the best that Mr. Fuhst could say is precisely what the district attorney said, and that is that he didn't hear that statement, he could in no way testify that Mr. Belloise didn't hear it or was making it up. The best he could say if he were called to the stand, to the stand to testify, is that he didn't hear it. On those grounds I think

counsel has not met his burden with respect to justifying a new trial. The motion for a new trial is denied.

With respect to point three, the post rape trauma ...

The motion is denied. Arraign the defendant for sentence...